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IN THE

Supreme Court of the United States

OCTOBER TERM 1947.

No. 565.

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of KATHRYN JONGEBLOED, deceased,

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of ROBERT JONGEBLOED, deceased, and

HERMAN C. JONGEBLOED, as administrator of the goods, chattels and credits of ELAINE JONGEBLOED, deceased,

Petitioner,

—against—

ERIE RAILROAD COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MILTON DUNN,
Solicitor for Petitioner.

ARTHUR A. BEAUDRY,
Counsel for Petitioner.

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STATEMENT.

If the brief of respondent, Erie Railroad Company, in opposition to the petition for certiorari herein, has succeeded in proving anything at all, it proves petitioner's contention

that he has been denied a fair trial according to the established forms which had come to be recognized as the minimum requirements of due process of law, under both the Federal Constitution and the Constitution of the State of New York.

Respondent's argument, at page "11" of its brief, apparently concedes that the record of the proceedings on the trial is wholly devoid of evidence or proof, or of any showing or notice of any kind, apprising the petitioner of any purported propositions of New Jersey law under consideration by the Trial Court, and that such omission would amount to a failure of due process of law unless the requirements of due process were otherwise satisfied or excused.

It seems to be respondent's contention on this proceeding that the failure of due process of law disclosed by the record can be overcome by the unsupported and unsworn statements in its counsel's brief, that Mr. Beaudry, petitioner's attorney, was apprised of all the questions of law being considered by the Trial Court. This is a unique and dangerous contention, and, if such practice were ever recognized, would permit adjudications affecting life, liberty and property without evidence, and allow the same to be sustained on review by mere assertions of counsel tending to show waiver or excuse of the omission or failure.

It also seems to be respondent's contention that whereas the failure to apprise a party on trial of the questions to be tried might constitute a denial of due process on a trial before some judges, that the same rule does not prevail where the Trial Judge is distinguished and respected, and that in the latter situation the same failure or omission would not amount to a denial of due process, and that it would be "a matter of serious concern," apparently resulting in unpleasant consequences, for the offended party to charge that he had been deprived of a fair trial.

Criticism of the method of trial as violative of due process of law involves no reflection upon the integrity of the Trial

Justice, and petitioner's objections to the manner of trial were taken in good faith to protect rights guaranteed to the petitioner by the Federal Constitution, and without any intent on the part of petitioner or his attorney of being disrespectful to the Trial Justice, and the petitioner cannot permit the respondent or its counsel to treat him as a wrongdoer, unworthy of the consideration of this Court, because he has invoked its aid to protect his constitutional rights.

An examination of the record will demonstrate that the petitioner herein made out, on trial, an unusually strong case of common law negligence against the respondent railroad company, entitling the petitioner to take his case to the jury; that the Trial Justice, who is conceded by respondent to be most distinguished and respected, took the same view of petitioner's case seems to be shown by the fact that if petitioner, as plaintiff below, had failed to prove a case under the common law, a verdict could have been directed against the petitioner, the plaintiff below, on that ground, and it would not have been necessary for the Trial Court to make findings on propositions of New Jersey law adopted by him (R. pp. 241-243).

We are also assured from the known learning and prestige of the Trial Justice, that in making the findings on propositions of New Jersey law, which he charged to the jury in directing a verdict dismissing petitioner's complaint below (R. pp. 241-243), without proof or showing on the trial as to the New Jersey law, that the Trial Court acted under the authority of Section 344-a of the Civil Practice Act of the State of New York, this being the only statute in New York State purporting to authorize such action by the Trial Court.

POINT I.

THE ASSERTED FEDERAL QUESTIONS ARE MOST SUBSTANTIAL AND AFFECT THE MOST FUNDAMENTAL PRINCIPLES OF WHAT WE HAVE COME TO UNDERSTAND AS DUE PROCESS OF LAW.

Respondent's attempts to avoid the Federal question lead it into specious argument which wholly loses sight of reality.

If we examine the record in this case and review the course of the trial as something not abstract, but real, happening within our own experience, we become suddenly aware that the result is a shocking denial of justice.

We see the petitioner, the plaintiff below, suing for the tragic deaths of his wife, a son and a daughter, upon well defined recognized grounds of defendant's liability, proving his case under the common law, which was presumed to be the common law of New Jersey and the only law presumed to be known to the Court, and we see petitioner, despite great difficulties and relentless opposition, patiently presenting and developing his proofs and, by great and unremitting perseverence, establishing an unanswerable case of defendant's negligence, entitling the petitioner to recover for the deaths of his wife and children.

But with all the evidence in and the case closed, the petitioner is awakened from his dream, the trial and the great case of negligence which he established was only a mockery, and he learns for the first time that his case is to be tested and dismissed on propositions of law, or some strange system of law, evolved by the Court, by its own independent study and research of New Jersey law, as to which petitioner was not apprised during the trial and had no opportunity to be heard (R. pp. 241-243).

This was in absolute derogation of the established practice with reference to the proof of foreign law and the right to be heard thereon, which had been always followed in New York State and which had become recognized as essential to due process of law.

Due process of law is guaranteed by the Fourteenth Amendment of the Federal Constitution, and we are at a loss to determine by what course of reasoning the respondent arrives at the conclusion that the Federal question presented is not a substantial one.

There seems to be little merit to respondent's contention that a mere error of law is involved and that the question of due process is not presented.

Section 344-a of the New York State Civil Practice Act, set out at pages 31-32 of the petition and brief, is clear and simple in wording and needs no construction, and if we examine it and match up the method followed by the Trial Court, in the case at bar, in handling the foreign law, with the different provisions of the statute, we can readily see that the practice followed by the Trial Court complies with the statute and is now the established practice in New York State.

It is clear, then, that the Trial Court committed no error of law, but followed the practice established by statute in New York State.

But even an error of law may amount to violation of the due process clause of the Fourteenth Amendment, as pointed out by Mr. Justice Brandeis, in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107, cited in petitioner's petition and brief at pages 18 and 19.

Nor is the statute, Section 344-a of the New York State Civil Practice Act, a mere rule of evidence, as contended by respondent. True, there are no vested rights in rules of evidence, and such rules may be changed by the Legislature almost at will, subject, of course, to the limitation that denial of due process of law does not result.

A new rule of evidence, altogether dispensing with evidence or proof and resulting in the denial of the right to be heard, would constitute denial of due process of law and be unconstitutional.

There lies the trouble with Section 344-a of the Civil Practice Act of the State of New York. The statute dispenses with proof of the foreign law, and results in the denial of the right to be heard and of due process of law.

POINT II.

THE COURT HAS JURISDICTION TO REVIEW THIS CASE. THE FEDERAL QUESTIONS WERE PROPERLY RAISED IN THE NEW YORK COURTS AND WERE NECESSARILY PASSED UPON BY THE NEW YORK COURTS.

The proceedings on the trial of the case at bar and petitioner's subsequent efforts to obtain a review of his case and the opposition encountered, are more eloquent than any words which could be borrowed from any reported cases to demonstrate the absolute repudiation by Section 344-a of the Civil Practice Act of the State of New York, and the practice established thereby, of all the processes of law which had come to be recognized as essential to due process of law under the Constitution of the State of New York and the Fourteenth Amendment of the Federal Constitution.

In the case at bar, the petitioner, the plaintiff below, was not apprised of the propositions of foreign law which were being considered by the Trial Court, and an opportunity given to him to be heard. Not only that, but he was not even apprised that propositions of foreign law were being considered and that the Court intended to dispose of his case on propositions of foreign law, without giving him an opportunity to be heard, and he had no means of knowing that his constitutional rights were being violated, and he had no opportunity to raise constitutional questions on the trial.

However, when the petitioner raised the question of the constitutionality of Section 344-a of the Civil Practice Act of the State of New York, in the Appellate Division of the Supreme Court, which was his first opportunity, the respondent argued, and apparently successfully, that the Appellate Division had no authority to pass upon a constitutional question which had not been raised in the Trial Court.

Throughout the numerous proceedings in this case, the respondent, in its counsel's briefs, has regularly resorted to the practice of arguing facts not appearing in the record,

and its versions of the facts presented in its briefs have not always been accurate or complete and have never rendered complete justice to the opposition.

In respondent's brief in opposition to this application, the statement is made that in raising the question of the constitutionality of Section 344-a in the Appellate Division of the Supreme Court, that petitioner did not raise the question of due process of law, and excerpts from petitioner's briefs in the Appellate Division are included in the appendix to respondent's brief.

The respondent entirely omits to mention that on a motion in the Appellate Division of the Supreme Court, for leave to appeal to the Court of Appeals, that the petitioner, in his arguments as to the constitutionality of Section 344-a of the Civil Practice Act, argues the denial of due process of law and, therefore, the fact is that all constitutional questions were raised in the very first Court in which the same could have been raised.

But this becomes immaterial in view of the fact that the same arguments were made by respondent in the Court of Appeals on respondent's motion to dismiss petitioner's appeal to that Court, taken on constitutional grounds (*Jongebloed* v. *Erie*, 296 N. Y. 12, 72 N. E. (2d) 627).

The Court of Appeals having denied respondent's motion to dismiss petitioner's appeal to that Court, held petitioner's pending motion to that Court for leave to appeal to be unnecessary, and denied the same on the ground that the appeal lay as matter of right, on April 17th, 1947. The memorandum decision appears at 296 N. Y. 994, 73 N. E. (2d) 570, and reads as follows:

> "The plaintiff argued that the directed verdict on propositions of New Jersey law as to which there was no proof and no showing during trial and as to which plaintiff was not apprised during trial and was given no opportunity to be heard on the law or to present facts and evidence material to such propositions, constituted a denial of due process of law in violation of

> article 1, section 6, of the state Constitution and of the Fourteenth Amendment of the Federal Constitution, and of the right to trial by jury guaranteed by article 1, section 2, of the state Constitution. The defendant claimed that section 344-a of the Civil Practice Act was constitutional, and that the trial court properly directed a verdict for defendant and dismissed the complaint."

The statements in respondent's brief as to what occurred in the Court of Appeals on the argument of the petitioner's appeal in that Court, are in error and convey an erroneous impression.

The argument in the Court of Appeals was devoted almost entirely to the question of due process of law, and when respondent's counsel attempted to argue that the constitutional question should be limited to the constitutionality of Section 344-a of the Civil Practice Act, and that the question of due process of law was not otherwise involved, he was definitely and firmly overruled by Chief Judge Loughran, who held that due process of law and all the constitutional questions raised by petitioner, the appellant, were properly before the Court.

The report of the decision in that Court, reported at 297 N. Y. 534, 74 N. E. (2d) 470, shows the questions involved to be as follows:

> "The plaintiff argued that the directed verdict on propositions of New Jersey law as to which there was no proof and no showing during trial and as to which plaintiff was not apprised during trial and was given no opportunity to be heard on the law or to present facts and evidence material to such propositions, constituted a denial of due process of law in violation of article 1, section 6, of the state Constitution and of the Fourteenth Amendment of the Federal Constitution, and of the right to trial by jury guaranteed by

article 1, section 2, of the state Constitution. The defendant claimed that section 344-a of the Civil Practice Act was constitutional, and that the trial court properly directed a verdict for defendant and dismissed the complaint."

The appellant's briefs in the Appellate Division were not offered by the respondent in the Court of Appeals for the purpose of limiting the constitutional questions before the Court of Appeals, but they were offered by respondent's counsel for the purpose of trying to show from the arguments made in petitioner's briefs in the Appellate Division, that petitioner had been fully apprised on the trial as to the questions being considered by the Trial Court, and the method of trial to be followed, and that by failing to object, at that time, petitioner had lost the right to object or to raise constitutional questions.

It is such contentions of the respondent, in its briefs and on the argument in the Court of Appeals, which prompted the affidavit of petitioner's counsel, on the motion for reargument in the Court of Appeals, from which excerpts are set out in Appendix "B" of respondent's brief hereon.

The petitioner's briefs in the Appellate Division were not directed to be filed with the Clerk of the Court of Appeals by Chief Judge Loughran, as stated in the footnote at page "7" of respondent's brief.

Many off the record statements had been made in respondent's briefs, and Chief Judge Loughran had advised petitioner's counsel to disregard such statements and to confine himself to the record and that nothing not in the record would be considered, and when respondent's counsel offered to submit the petitioner's Appellate Division briefs, Chief Judge Loughran refused to receive them, and upon respondent's insistence that the same be received or that a motion would be made to amend the record in some form, Chief Judge Loughran impatiently suggested to respondent's counsel that he could hand them to Mr. Ludden, the Clerk of the Court, who was present in the courtroom, if he pleased.

Respondent's criticism that petitioner has not complied with the requirement of Rule 12, is not well taken. In the present case, the federal questions could not be raised by pleading, by request to charge, or by exception or assignments of error, and the manner in which the same were raised is fully set forth in the petition.

The federal questions were properly raised below and were recognized in the Court of Appeals as properly before that Court, and the same are properly before this Court.

CONCLUSION.

IT IS SUBMITTED THAT A WRIT OF CERTIORARI SHOULD BE GRANTED AS PRAYED FOR IN THE PETITION.

Respectfully submitted,

MILTON DUNN,
Solicitor for Petitioner.

ARTHUR A. BEAUDRY,
Counsel for Petitioner.